

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

UNION INSTITUTE & UNIVERSITY

Employer

and

UNITED PROFESSIONS OF VERMONT-
AMERICAN FEDERATION OF TEACHERS
AFL-CIO

Petitioner

Case 1-RC-21984

[\[1\]](#)

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of academic and administrative staff employees employed by the Employer at its Montpelier, Vermont campus. The Employer maintains that three administrative directors are statutory supervisors, managerial employees, and/or confidential employees who should be excluded from the unit, while the Petitioner asserts that these three individuals are non-supervisory, non-managerial, and non-confidential. I find that the three administrative directors – Carol Beatty, Louise Crowley, and Jessica Lutz – are neither supervisors, managerial employees, nor confidential employees, and are properly included in the appropriate unit.

BACKGROUND

The Employer is a distance learning university for adult learners with undergraduate centers in Los Angeles, and Sacramento, California, Cincinnati, Ohio, North Miami, Florida, and

Montpelier, Vermont. The Vermont Campus, which is the only one at issue here, is the former campus of Vermont College, which was purchased by Norwich University in 1971, and then purchased by the Employer in 2001. In addition to the undergraduate programs, the Employer offers graduate level programs in fine arts at its Vermont campus. Specifically, the Employer offers masters of fine arts (MFA) degrees in writing and visual arts. The Employer has about 450 [2] full- and part-time employees, about 130 of whom are based at the Vermont campus.

As a distance learning center, the Employer is not a typical higher education institution. Its students – or learners, as the Employer calls them – are adults engaging in independent courses of study with faculty advisors who may be located anywhere. Each student is required to begin every semester with a residency, either on-campus or virtual, in which they engage with faculty advisors to plan their course of studies. Under-graduates have four options for completing their residencies: the eight-day cycle residency, two weekend options, and the virtual option. In the cycle option, which was originally the only one available, students and faculty convene on campus for a week of planning and evaluation of the semester's studies. The weekend options permit students to attend on-campus meetings one weekend a month all semester. Most recently, the Employer added a virtual option, an "intense online experience" [3] spanning two weeks each semester. Following the residency, students and their teachers return home and communicate electronically throughout the semester.

Richard Hansen is the Employer's interim provost and the vice president for academic affairs of the Employer. He is based in Cincinnati, but he has responsibility for all the Employer's campuses. Victor Ehly is the dean of the Vermont campus, with direct responsibility for all academic and non-academic aspects of the Vermont-based undergraduate programs. Brian Webb, assistant vice president of academic affairs and director of masters programs, oversees university-wide master's degree programs, including the two offered in Vermont.

THE ADMINISTRATIVE DIRECTORS

The three individuals whose status is at issue are all administrative directors for the Employer's academic programs. Carol Beatty, the administrative director of the undergraduate programs in Vermont, reports to Ehly. She oversees the work of five full-time staff, including [4] four assistant directors and a program coordinator. Louise Crowley and Jessica Lutz are administrative directors of the master of fine arts writing (MFAW) program and the master of fine arts visual arts (MFAV) program, respectively. Crowley oversees two employees, while Lutz oversees one.

Beatty has worked at the Vermont campus since 1985, when it was operated by Norwich University. From January 2002 to October 2005, she was employed as the senior associate director of the Employer's Vermont campus undergraduate program. In the fall of 2005, following a reorganization of the Employer's undergraduate program, Beatty became its administrative director. Her responsibilities are to manage and oversee undergraduate program operations in Vermont, including the cycle and weekend residency options in Montpelier and Brattleboro, and Virtual Vermont. The assistant directors who report to her are responsible for planning and coordinating the various residency programs described above.

Crowley, a 24-year employee on the Vermont campus, has been administrative director of the MFAW program since 1997. In addition to overseeing the work of the assistant director, her duties include responsibility for student applications and enrollment, monitoring student progress, maintaining records in connection with the administration of the MFAW program, collaborating with faculty on the design of the academic program, and overseeing the student residency program.

Jessica Lutz has worked on the Vermont campus since 1991 and has been the Employer's administrative director of the MFAV program since 1999. The majority of her time is focused on student retention and progress. Lutz also has overall responsibility for the administrative functions associated with the MFAV program, including exhibition of student work, coordination of residency programs, and collaboration with faculty on program design and other academic initiatives.

Supervisory Status

The Employer asserts that the three administrative directors are statutory supervisors by virtue of their authority to hire, assign work and direct employees, conduct performance evaluations, schedule employees, discipline, adjust grievances, and reward employees.

Hiring

Beatty is involved in the hire of employees who report to her. Although there have been no new hires since her promotion to the administrative director position, Beatty has participated in hiring decisions prior to October 2005. Although the Employer contends that Beatty has the authority to hire employees to fill vacancies on her staff, in reality the function is performed by a search committee, which Beatty either chairs or sits on. Beatty testified that, when a vacancy arises in a position reporting to her, she convenes and chairs a search committee, which reviews

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applications, interviews candidates, and makes a recommendation to Dean Ehly. Beatty has never made a hiring decision apart from such a committee.

In 2005, Beatty initiated the hiring process to fill a vacant position at the Employer's Brattleboro, Vermont site. Beatty requested permission to post and fill the position, but Ehly

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ultimately denied her request because of budgetary concerns.

When MFAW Assistant Director Katie Gustafson resigned her position in October 2005, Louise Crowley requested and received permission to replace her. Crowley chaired a search committee consisting of two other staff members and one faculty member, participated in the interviews of three candidates, and jointly decided to recommend Melissa Fisher for the position. Although Crowley sent the recommendation to her supervisor, Brian Webb, she testified that the decision to recommend Fisher was made by consensus in the committee. Webb supported the committee's recommendation after conducting independent interviews of the top two candidates.

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Similarly, when MFAV Assistant Director Danielle Dahline resigned her position in October 2004, Lutz and Webb formed a search committee comprised of Crowley, Gustafson, and Lutz. The committee interviewed several candidates and presented their top two choices to Webb, along with their recommendation. Webb interviewed the two candidates before deciding to accept the committee's recommendation.

Three weeks after Dahline's resignation, Lutz sought Webb's permission to hire her as a consultant, at a rate of \$11 an hour for a total of 20 hours, to train the new assistant director. Webb recommended approval of the request, which was then approved. Lutz also recommends individuals for hire on an as-needed basis for assistance with specific residencies. For example, in November 2005, she sought permission to rehire facilities employee Bill Cameron as a contract employee to assist with preparations for an MFAV residency.

Assignment of Tasks and Responsible Direction

Beatty conducts weekly staff meetings during which she oversees the planning and coordination of the various residencies. Each of her assistants is responsible for a particular residency program, with two assistants assigned to the weekend options. Assistant directors track and direct the work of students within their respective residencies. They also schedule and coordinate the on-campus residencies, providing administrative support and ensuring that students and faculty have meeting space, housing, food, and other services. Beatty is currently

cross-training the assistant directors so that they will be able to work together as needed and temporarily shift to a different residency option if scheduling requires it or if enrollment declines in their area.

There is little record evidence regarding the extent to which Beatty assigns or directs the work of the assistant directors. Ehly testified that she “oversees,” “plans,” and “coordinates” their work, but did not give specifics. Decision-making and assignments appear to be consensus-based, both between Beatty and Ehly, and Beatty and her assistant directors. Beatty spends 75 percent of her time supporting the assistant directors as they plan and coordinate the residencies. According to Beatty, the structure of the residency program does not change from semester to semester, and has been the same for many years. Her job is to ensure that the residencies, which are the core of the Employer’s academic programs, run smoothly.

As a member of the Faculty Affairs Committee, Beatty is involved in determining which faculty members will be assigned to particular students. These assignments are made by faculty on the committee, with Beatty providing administrative support in the form of faculty workloads, schedules, and the like.

Scheduling, Time Off, and Overtime

There is little record evidence regarding the work schedules of the employees who report to the administrative directors. However, in at least one instance, Crowley exercised her authority to adjust an employee’s work schedule so as to accommodate a recent relocation. Crowley oversees the work of Carol Mercurio, the managing editor of the Employer’s literary magazine, *Hunger Mountain*. When Mercurio moved from Montpelier to Maine, Crowley approved a change in her work schedule to allow Mercurio to work at home most of the time, traveling to Vermont only when necessary.

Because of the nature of the Employer’s academic programs, salaried staff have considerable latitude in adjusting their schedules to accommodate the fluctuating workload. For example, before and during a residency, administrative staff might work for several days without a day off, and then take a day off as the work permits. Dean Ehly testified that Beatty has the authority to

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approve such time off and is not required to consult him before granting it. Ehly also testified that Beatty has the authority to approve a leave of absence, but she has never done so. Beatty testified that she would consult with Ehly before granting a leave of absence.

Although there is little evidence in the record regarding the approval of overtime, Lutz has, on at least one occasion, asked for permission to assign and compensate overtime work.

Performance Reviews and Wage Increases

Administrative directors conduct employees' annual performance appraisals. Beatty [9] testified that she and the employee each fill out an appraisal form before meeting to discuss it. After they meet, Beatty drafts a final version of the evaluation and forwards it to human resources. Crowley and Lutz described similar processes for the annual appraisals they conduct. They do not consult their supervisor, either before or after the appraisal, although Webb does sign off on the appraisals conducted by Crowley and Lutz.

In evaluating employees, administrative directors make no recommendations concerning promotions or wage increases. In fact, Beatty testified that there has not been money available for merit increases in several years. She does not know what her role would be in the event that money was available for merit increases.

In October 2005, as described above, Crowley convened a committee to hire a new assistant director. In conjunction with that hire, Crowley and a faculty advisory committee recommended increasing salaries for several positions, including the assistant director position. Specifically, the committee recommended increasing the assistant director's salary by about \$7500, or 28 percent. In making the recommendation to Chief Financial Officer Ed Walton, Crowley indicated that the advisory committee had reallocated certain funds in their budget in order to accommodate the requested salary increase. Ultimately, the assistant directors' salary was increased by about \$3000.

Discharge and Discipline

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The Employer's policy manual outlines its progressive discipline system for offenses not involving gross misconduct. Although the policy gives "supervisors" the authority to issue verbal and written warnings, none of the administrative directors has ever disciplined an [11] employee, or effectively recommended discipline.

Adjustment of Grievances

The Employer maintains a policy regarding the "Appeal of Disciplinary or Other Adverse Action," under which employees are encouraged to resolve differences with their supervisors. Under the policy, an employee's first step is to discuss the situation with his or her "manager." Ehly gave uncontradicted testimony that, for purposes of handling grievances, Beatty is the

manager of the undergraduate program staff and has the authority to resolve any grievance at this step. Ehly acknowledged that, given their collaborative relationship, Beatty would likely bring any grievance issues to him, but testified he could not imagine not accepting her recommendation. Beatty testified that she has never been approached with an employee grievance, although she is occasionally called upon to resolve a conflict or concern that an assistant director might raise. In that case, Beatty testified she would mediate the issue. Neither Crowley nor Lutz has ever handled an employee grievance.

Secondary Factors

In their job descriptions, Beatty, Crowley, and Lutz are said to “supervise” and “manage” the assistant directors who report to them. There is no record evidence regarding the relationship between administrative directors’ salaries and those of the assistants, or between the administrative directors’ salaries and those of Ehly and Webb.

Beatty, Crowley, and Lutz have bachelor’s degrees, while Ehly and Webb have doctoral degrees.

Beatty, Crowley, and Lutz each has an office on the Vermont campus. Beatty’s office is adjacent to Ehly’s in Frail House, which also houses the five employees who report to her. Crowley and Lutz have offices on the fourth floor of College Hall, where Webb and the assistant directors also work.

When Ehly is on vacation or off campus for any reason, Beatty is “in charge” of undergraduate administration. Nevertheless, Ehly testified that Beatty would know how to reach him at all times.

Analysis

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient

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to confer supervisory status. Chicago Metallic Corp. The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. New Fern

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Restorium Co. The burden of proving supervisory status rests on the party alleging that such

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status exists. NLRB v. Kentucky River Community Care. The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co. [\[15\]](#)

As indicated above, the Employer asserts that the three administrative directors are statutory supervisors by virtue of their authority to hire, assign work and direct employees, conduct performance evaluations, schedule employees, discipline, adjust grievances, and reward employees. I find that the Employer has failed to meet its burden of proving that the Directors exercise Section 2(11) authority.

Hiring

While administrative directors are involved in the hiring of their subordinates, the Employer has not demonstrated that they have authority to make hiring decisions or to effectively recommend such action. Beatty, Crowley, and Lutz have participated in similar hiring processes for assistant directors. Because of the nature of the Employer's programs, hiring decisions are collaborative efforts, made at the highest administrative levels following consensus by a search committee. Even where one of the administrative directors chairs the search committee, the screening, interview, and hiring process is consensus-based. Moreover, in the case of Crowley and Lutz, Webb conducts his own independent review of the recommended candidates by interviewing the committee's top two choices. Thus, the Employer has not demonstrated that the administrative directors have the authority to hire or effectively recommend a hire.

On one occasion, Lutz sought approval to hire former Assistant Director Dahline as a consultant to train her successor. The request was reviewed by Webb and approved at a higher level. Rather than demonstrating Lutz's authority to hire, the incident tends to support the Union's position that the administrative directors lack the authority necessary to confer supervisory status.

It is also noteworthy that the administrative directors lack the authority to fill vacant positions. In this regard, Beatty's request to fill a vacant part-time position in Brattleboro, Vermont was denied on the basis of budgetary considerations. Similarly, when MFAW Assistant Director Gustafson resigned, Crowley requested approval to fill the position before forming a search committee to fill it.

Assignment and Responsible Direction

I find that the Employer has failed to demonstrate that the three administrative directors exercise

independent judgment in assigning work to or responsibly directing the unit employees. There is no evidence that any of the three assign tasks to their subordinates, or that they use independent

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judgment in directing their work. North Shore Weeklies (press supervisors are not statutory supervisors, where the record does not reveal the particular acts and judgments that make up their direction of work). For example, each of the four assistant directors who report to Beatty was hired to administer a particular residency option, and there appears to be little overlap between them. Each option operates on a different schedule, with different faculty and students, and different administrative needs, and they do not appear to receive assignments from Beatty. Although Beatty is currently working to cross-train the assistant directors in order to foster teamwork, it is not clear whether she will reassign them to assist each other, or what criteria she would use to do so. I find this evidence too speculative to form the basis for a finding of supervisory authority.

Scheduling, Time Off, and Overtime

Administrative directors appear to have little role in scheduling employees for work. Of the three, only Crowley appears to have had a role in determining the work schedule of one of her employees. In a situation not likely to reoccur with any frequency, Crowley authorized *Hunger Mountain* Editor Carol Mercurio to work from her new home in Maine, and to come to the Vermont campus only when necessary. The administrative directors do approve personal time off, but there is no evidence that they exercise independent judgment in doing so. Rather, it appears that the assistant directors have considerable latitude in the performance of their jobs. Routine approval of things like sick leave and personal time off is not a supervisory function, especially where, as here, there is no evidence that the administrative directors possess the

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discretion to reject such requests. Spector Freight System, Inc.

Although the Employer contends that the administrative directors have the authority to grant leaves of absence, none of them has ever done so. Beatty testified that she would consult with Ehly before approving a leave of absence.

Administrative directors lack the authority to require employees to work overtime, or to compensate them for doing so. All overtime is subject to prior approval, as every expenditure must be approved by a supervisor, and the Employer has not produced any evidence that administrative directors can compel uncompensated overtime. Moreover, the Board has held that authority to request, but not compel, employees to work overtime does not confer supervisory

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status. Riverchase Health Care Center.

Discipline

The Employer has failed to demonstrate that supervisors have authority to impose discipline. Although the Employer's policy manual appears to give them the authority to issue verbal and written warnings, neither Beatty, Crowley, nor Lutz has ever disciplined any employee.

Adjustment of Grievances

I find that the Employer has failed to meet its burden to establish that the three administrative directors have authority to adjust grievances. Although it is the Employer's policy that employees bring complaints about unfair conditions and other work-related issues to "the manager with adequate information regarding the problem," there is no evidence that any administrative director has ever actually adjusted a grievance or effectively recommended its

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adjustment. Birmingham Printing Pressmen's Local Union #55 (there was no evidence as to substance of the foreman's alleged authority to adjust grievances, where he had never done so).

Rather, Beatty described her role as that of a mediator, one who brings the affected parties

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together so that they can resolve the matter on their own. See, e.g., Ken-Crest Services (authority to resolve minor grievances or settle "squabbles" between subordinates insufficient to establish supervisory status).

Authority to Reward

The Employer maintains that the performance appraisals conducted by the administrative directors are indicia of their supervisory authority. It is undisputed, however, that the administrative directors make no recommendation regarding wage increases for their subordinates. In fact, the Employer has not awarded merit raises in several years, and there is, in any event, no evidence in the record suggesting that the appraisals completed by administrative directors have ever been used to determine compensation. The Board has long held that the evaluation of employees is not evidence of supervisory status unless the evaluations directly

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affect employees' wages or other terms of employment. Passavant Health Center; Waverly

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Cedar Falls; Ohio Masonic Home.

Secondary Indicia

It is well settled that possession of a title does not in and of itself confer supervisory status

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under the Act. Hallandale Rehabilitation and Convalescent Center. Although the administrative directors' job descriptions state that they "supervise" the assistant directors, the issuance of paper authority which is not exercised does not establish supervisory status.

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Crittenton Hospital. Moreover, such secondary indicia are insufficient to establish supervisory status when there is no evidence presented that these individuals possess any one of

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the several primary Section 2(11) indicia. Ken-Crest Services.

Accordingly, I find that the administrative directors are not supervisors within the meaning of the Act, and, therefore, they need not be excluded from the unit on this basis.

Managerial Status

The Employer's academic programs are designed and implemented by the faculty as a whole. In addition, faculty members comprise various committees charged with evaluating and revising the various academic programs. Decisions regarding hire and tenure of faculty, student admissions, assignment of students to advisors, removal of students from a program, the academic content of residencies, visiting artists, exhibition of student art, and other academic matters are made by the faculty. Although administrative directors often participate on the committees that make these decisions, their role is limited to providing data, making recommendations based on such data, and giving other administrative support to the decision makers.

Carol Beatty

Prior to her appointment to the newly created assistant director position, Beatty collaborated with Ehly to reorganize the administration of the undergraduate program. Their collaboration does not appear to have resulted in changes to the Employer's academic offerings, but only to the way the undergraduate program is administered. While Ehly testified that Beatty was his equal in the collaboration, he provided few details regarding the nature of the reorganization, or the policy decisions involved in completing it. It is undisputed, however, that the relationship between Ehly and Beatty is a collaborative one: he oversees the undergraduate faculty and academic program, while she manages the program's administrative functions, including the residencies that are at the heart of the curriculum, and they collaborate "on everything."

Beatty chairs the Vermont campus' Educational Issues Committee (EIC), which is comprised of faculty members and is responsible for evaluating and recommending changes to

academic regulations and procedures. There is no record evidence indicating that Beatty's role as chair of the EIC gives her greater decision-making authority than other committee members. In fact, Beatty testified that it is the faculty who make decisions regarding such changes, and that her role is primarily supportive.

Beatty also sits on the Faculty Affairs Committee, which is responsible for assigning individual faculty members to student advisees. In her role as administrative advisor to the committee, Beatty provides data regarding faculty workloads and recommends which faculty members are available for particular residency options. In making these recommendations, Beatty relies on a chart of faculty work patterns, which she maintains in the course of her duties. The committee is chaired by Beatty's supervisor, Dean Ehly, who has the final word in making faculty assignments. According to Ehly, the committee accepts Beatty's recommendation 75 to 95 percent of the time.

In addition to her regular duties, Beatty is the administrative director of a university-wide committee engaged in undergraduate outcomes assessment on a national level. This committee will ultimately produce guidelines that will be used to evaluate the effectiveness of the Employer's undergraduate academic programs, which cannot be measured by traditional methods. Beatty described her involvement as "providing staff support" to the faculty members of the committee. For her work with this committee, Beatty is paid an extra \$1000 per month.

Beatty's duties include revising academic program standards as needed, to comply with federal education guidelines. A lack of compliance may jeopardize students' federally-funded financial aid.

Beatty participates in the annual process for setting tuition rates, providing administrative support and information such as enrollment projections, market research, and input regarding the potential effect of a tuition increase on undergraduates. Decisions regarding tuition increases are made by the Employer's finance office, with input from various sources, including marketing, admissions, and others. Beatty may make a recommendation based on the projections she has worked out with Ehly.

Beatty's job description indicates that she will be involved in the undergraduate program's budgeting process, preparing a draft budget based on enrollment projections and monitoring the budget. The Employer concedes, however, that she has not yet engaged in these tasks because she has held the position only since October.

Louise Crowley and Jessica Lutz

Crowley and Lutz have similar administrative roles in their respective programs. Crowley

testified that she “work[s] with the faculty, and the faculty chair, and the faculty affairs committee on the design of the [MFAW] program, and any initiatives that we might be talking about or thinking of in the future.” Crowley explained the supportive nature of her involvement: “Academic policy is set either by our faculty chair and our faculty affairs committee, or perhaps by authorities higher than that, perhaps the dean or vice president.” As the only constant presence of the MFAW program actually located on the Vermont campus, Crowley’s role is to “enact” any policies set by the committee, and to “integrate” them into the academic program.

Crowley also worked with the MFAW faculty to create a residency in Slovenia, although it appears her participation was limited to administrative support in implementing and managing the logistics of the program. Similarly, she worked with faculty to develop a residency in Sacramento, California. Although Crowley handled the logistics of the planned residency, there is no record evidence that she had the authority to make financial decisions in connection with it. In fact, in her memo to V.P. Webb, Provost Hansen, and Graduate Dean for the University Larry Preston, Crowley made reference to financial decisions that Provost Hansen had made. As with other initiatives in which she participated, Crowley’s responsibility appears to have been limited to implementing the academic and fiscal decisions made by other people. Ultimately, the Sacramento residency was canceled because of under-enrollment. Crowley communicated the committee’s decision to Hansen, informing him that the enrollment requirement established by the committee had not been reached.

Crowley testified about an administrative policy she proposed that was ultimately adopted by the MFAW program. Noting that students were often giving late notice of planned leaves of absence, Crowley suggested imposing a late fee to discourage this practice. The proposal was approved by the faculty chair and an advisory committee before going to Webb, CFO Walton, and Assistant Vice President for Administration and Finance Alice Soule-Collins for final approval.

Crowley also made a proposal regarding installing wireless internet access on the Vermont campus in order to better serve students. The proposal was based on requests made by several MFAW students, who complained that a distance learning center such as the Employer, which relies heavily on technology, was not providing adequate internet access on campus. Crowley’s 2005 memo to Hansen and Information Technologies Director Lori Williams requested that the Employer begin the process of researching the feasibility of adding wireless access. The Employer responded that its budget could not support the kind of wireless access Crowley was proposing, but offered to discuss alternative proposals. There is no record evidence on the outcome of Crowley’s proposal.

In 2001, Crowley and Lutz proposed a restructuring of the administrative staffing of the MFAW and MFAV programs. Their proposal included a summary of the existing programs and

initiatives, growth projections, and a cost analysis for increased staffing. The Employer introduced the proposal into evidence at the hearing, but offered no evidence whatsoever regarding what happened to it.

In 2005, Lutz sent Webb a memo detailing a plan to restructure the job of the exhibition coordinator. The memo is written in the first person plural: “*we* are working on restructuring the job of the Exhibition Coordinator and breaking it into two positions,” (emphasis added), but does not identify the participants. Lutz does make clear, however, that the committee is not seeking additional funds to accomplish the goal, but is instead consolidating existing positions within the existing budget. She also assures Webb that no decision will be made without his approval. In a subsequent memo, Lutz makes a formal recommendation to Webb concerning the restructuring of the position. There is no record evidence regarding the outcome of this recommendation.

Lutz also served on a planning committee charged with addressing issues arising from the sale of several buildings on the Vermont campus. The committee was responsible for the smooth relocation of the MFAV program from one campus building to another.

Lutz also drafted policy language for the Employer’s Vermont handbook. The draft relates to the Employer’s policy on artistic expression, and appears to have been prompted by a conversation between Lutz, Hansen, Attorney Pietro Lynn, and faculty co-chair Miwon Kwon. The Employer’s attorney approved the language, which was included in the handbook. On another occasion, Lutz recommended including language in the student handbook regarding the Employer’s responsibility for students’ personal property. After input from Webb, Soule-Collins, and Walton, the recommendation was approved.

Administrative directors have initiated projects that have ultimately become part of the Employer’s offerings. For example, Crowley designed and organized a Fall Foliage Writers Conference created to increase the visibility of the MFAW program, and recommended the establishment of the literary journal, *Hunger Mountain*. According to Hansen, Crowley generated the idea for the journal, proposed a budget for it, and recommended the staffing needs to create it.

The administrative directors play a role in creating and managing their programs’ budgets, as well as annual tuition changes. Although Hansen described Crowley’s involvement in budgeting as “total involvement, from deciding allocation within expense lines, moving allocations from a travel line to another expense line,” she testified that her involvement is limited to making enrollment projections that, in turn, drive the budget. Similarly, Hansen testified that Crowley “oversees the restricted funds and awards process for merit scholarships,” stating that she has “total discretion” over the allocation of scholarship money donated to the University. Crowley explained that the formula used to award merit scholarships was

“established long ago by the faculty,” and that she simply applies the formula to determine the [\[27\]](#) appropriate award for students who are recommended for awards by the faculty.

Hansen testified that Crowley plays an important role in determining tuition levels each year, even stating that the Employer has changed its tuition based on her recommendation. In making this assertion, Hansen offered few details of the process by which tuition was changed, but did indicate that Crowley offers enrollment projections and market research to the process of setting tuition. For example, Crowley provides research and information on schools with which the Employer competes for students, as well as information on specific students who are leaving the MFAW program for financial reasons.

Lutz spends about five percent of her time designing and managing program budgets. There is no record evidence regarding the specifics of her involvement in the budgeting process. Nevertheless, in November 2005, she learned that the amount of money available for MFAV scholarships had been reduced without her knowledge, even though she had already committed the previously approved amount for student scholarships.

The Union introduced a series of e-mails in which Lutz requested permission to spend program money on overtime expenses, copying, faculty meals, car rental, and various office equipment. Most of her requests were approved under the Employer’s policy requiring all employees, including managers and supervisors, to obtain approval from the next management level before incurring expenses.

Analysis

Unlike supervisors, managerial employees are not expressly excluded from the protection of the Act. Nevertheless, it is well established that employees will be excluded from the unit as managerial employees only if they “formulate and effectuate management policies” by expressing and making operative decisions of their employer or have discretion in the performance of their jobs independent of the employer’s

[\[28\]](#) established policy. NLRB v. Bell Aerospace Co.; [\[29\]](#) Reading Eagle Co.; Ohio River Co. [\[30\]](#)

They must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary

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actions that effectively control or implement employer policy. NLRB v. Yeshiva University.

Academic policy on the Vermont campus, like that in Yeshiva, is governed by the faculty, who sit on representative committees, selecting and scheduling courses, setting performance standards, and making decisions regarding hiring and retention. Although the Employer is a non-traditional setting where courses are offered through a series of residencies and independent studies, and although its faculty is geographically dispersed, faculty members still control its management policies. The Employer's Academic Affairs Committee, which is dominated by faculty members, is responsible for curriculum development, admissions decisions, and degree conferral, the essential decisions of an educational institution.

Neither Beatty, Crowley, nor Lutz possesses the degree of autonomy required of managerial employees. While they have the title of director, the Board has held that titles alone do not confer managerial status. Rather, the test for determining managerial status is based on

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“actual job responsibilities, authority, and relationship to management.” Bell Aerospace.

I find that the Employer has not met its burden of demonstrating that the administrative directors use independent discretion to formulate and effectuate management policies. Rather, they provide administrative support and planning for policy changes initiated and authorized by faculty committees and higher level administrators.

Prior to her assuming the title of administrative director, Beatty worked with Ehly on the planning and restructuring of the administration of the undergraduate program. The process was highly collaborative, with Beatty lacking the authority to make any decisions independent of Ehly. Moreover, it is not clear from the record that the administrative restructuring amounted to anything more than a shuffling of duties or a realignment of the administrative functions to reflect the realities of the program.

The Employer argues that Beatty's participation in the university-wide outcomes assessment committee gives her managerial control over academic decisions and direction. The committee is charged with creating guidelines to ensure that, in this independent study-based program, there will be a common core of liberal arts learning for all undergraduates. Moreover, Beatty's work on this committee is not part of her duties as administrative director. Instead, she is paid an additional \$1000 a month for this work.

Similarly, Beatty's participation on the EIC and the Faculty Affairs Committee do not make her a managerial employee. The decision-making authority of those committees rests in the faculty who serve on them, with Beatty participating in an administrative capacity.

Contrary to the Employer's contention, Beatty's involvement in revising program standards does not require independent judgment or discretion. Instead, she merely reviews existing standards to ensure compliance with federal guidelines. Similarly, her recommendations regarding faculty assignments are based on current workloads, rather than independent judgment or discretion, and her recommendations regarding tuition increases are based on enrollment statistics.

Crowley and Lutz have even less autonomy than Beatty. The Employer produced evidence demonstrating that they have proposed administrative changes, but it has not demonstrated that their proposals carry more weight than those made by other employees. For example, in 2001, they jointly proposed a restructuring of the administrative staffing of the MFAW and MFAV programs, but it is unclear from the record whether their proposals were

[\[33\]](#)

accepted. Similarly, Crowley proposed installing wireless internet access on the Vermont campus, based on student comments, but her proposal was rejected for financial reasons.

Although the Employer demonstrated that Crowley has conceived initiatives that were ultimately implemented, her discretion in these situations does not rise to the level of managerial authority. For example, Crowley suggested a new policy imposing late fees on students who gave untimely notice of planned leaves of absence. Nevertheless, her limited authority in this regard is demonstrated by the fact that the proposal required the approval of the faculty chair, an advisory committee, two vice presidents, and the chief financial officer before becoming university policy.

Crowley also designed and organized a Fall Foliage Writers Conference, and recommended the establishment of the literary journal, *Hunger Mountain*. Although both ideas were adopted and implemented, they do not represent the kind of policy decisions required to exclude individuals from the unit as managerial employees.

The Employer contends that Lutz' participation in drafting language for various university handbooks is evidence that she formulates and effectuates management policy. At the request of Hansen and faculty co-chair Kwon, Lutz drafted language regarding the Employer's policy on artistic expression for inclusion in the Employer's Vermont handbook. Similarly, at the direction of CFO Walton, Lutz and faculty members drafted policy language for the student handbook. Lutz also drafted "minor administrative clarifications and program changes" for the MFAV handbook. According to Lutz, these proposals reflected changes that were already in effect, rather than new programmatic initiatives. None of this work demonstrates an ability to formulate or effectuate management policy.

Contrary to the Employer's assertion, the record indicates that administrative directors play only a minor role in determining employee compensation. The Board has held that employees who possess the authority to determine employee compensation have managerial authority and must [\[34\]](#)

be excluded from the bargaining unit found appropriate. Eugene Register Guard. As described above, Crowley and a faculty advisory committee recommended increasing salaries for several positions, including the recently vacated assistant director position. At the committee's recommendation, the Employer increased the assistant director's salary by about half the requested amount. In these circumstances, Crowley's role in the recommendation leading to the increase is too attenuated to infer managerial authority. Moreover, as discussed above, the evaluations conducted by the administrative directors have no effect on pay or employment status.

The Employer takes the position that the administrative directors' authority to recommend tuition changes and award merit scholarships makes them managerial employees. Beatty makes enrollment projections, provides information regarding the Employer's competitors, and gives input regarding the impact that tuition increases may have on student retention. Crowley awards merit-based scholarships as directed by the faculty and according to a formula set by the faculty long ago. She occasionally deviates from the formula, but only when a faculty member asks her [\[35\]](#)

to grant the maximum amount available for exceptional, one-of-a-kind candidates. Lutz had neither input into nor knowledge of a 2005 decision to decrease the amount of money available for MFAV scholarships, even though she was responsible for awarding the scholarships. Such administrative support and extremely limited discretion do not evidence the kind of managerial prerogative sufficient to exclude the administrative directors from the unit. Moreover, even if their input were significant, setting tuition and awarding scholarships have no direct impact on employee compensation and, therefore, are not indicators of managerial status.

Beatty, Crowley, and Lutz lack the authority to enter into contracts on the Employer's behalf, or even to spend small amounts of money without prior approval. In accordance with the Employer's policy requiring pre-approval for any expenditures, Lutz requested permission to purchase a \$50 computer accessory, to authorize 40 hours of overtime, and to pay for faculty meals.

Accordingly, I find that the administrative directors are not managerial employees and, therefore, they need not be excluded from the unit on this basis.

Confidential Employee Status

Administrative directors have access to the confidential faculty evaluations that are

completed by students following each residency and used in the Employer's peer evaluation process. According to the Employer, student evaluations can inform decisions regarding the retention of a particular faculty member. Administrative directors also have access to staff salary information, and, as described above, have participated in committees making recommendations regarding salary increases.

Analysis

I conclude that the evidence does not support the Employer's contention that the administrative directors are confidential employees. A confidential employee is one who "assist[s] and act[s] in a confidential capacity to persons who formulate, determine, or effectuate management policies [36] in the field of labor relations." B.F. Goodrich Co. The mere handling of or access to confidential information, including personnel records or financial information, is insufficient to exclude an employee from the unit as confidential. Lincoln Park Nursing & Convalescent Home. [37]

As the only evidence of the administrative directors' confidential status is their access to student evaluations and to certain bargaining unit salary information, they do not fall within the Board's narrow exemption for confidential employees.

Accordingly, I find that the administrative directors are not confidential employees and, therefore, they need not be excluded from the unit on this basis. Having found no basis upon which to exclude them from the appropriate unit, I will include them in that unit.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time academic staff and administrative staff employees, including the coordinator of lifelong learning, director of learning support, national marketing director, assistant registrar, administrative directors, administrative assistants, academic support specialists, assistant pursers, assistant directors, assistant librarians, enrollment counselors, financial aid counselors, help desk specialists, information specialists, instructional technologists, lab proctors, learner accounts coordinators, mail room/copy center clerks, office managers, program coordinators, reference librarians, research services electronic librarians, technical services librarians, housing manager, and secretaries employed by the Employer at its Vermont College campus, Montpelier, Vermont, but excluding the Geary Library director, director of instructional technology, facilities supervisor, executive assistant to the provost, admissions director, all managerial employees, confidential

employees, custodians, maintenance employees, professionals, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by United Professions of Vermont, American Federation of Teachers, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior

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[\[39\]](#)

Underwear, Inc.; NLRB v. Wyman-Gordon Co. Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon

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Health Care Facility. In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before February 23, 2006. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 2, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 16th day of February, 2006.

[1]

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[2]

Because of the nature of the Employer's programs, many of the Vermont-based employees do not actually work in Vermont. For example, faculty are scattered throughout the country, teaching via electronic communications and a series of residencies that will be described below.

[3]

Students in the MFA programs have the same residency requirement, but they do not have the weekend or virtual options.

[4]

According to her job description, Beatty also supervises a part-time residency coordinator based in Brattleboro, Vermont, although that position has been vacant since Beatty assumed her current position.

[5]

Ehly testified that he could not imagine rejecting one of Beatty's hiring recommendations. He acknowledged, however, that such a recommendation would typically come from a search committee, rather than solely from Beatty.

[6]

Ehly speculated that, had the position been approved, Beatty would have had full authority to interview and hire.

[7]

Crowley testified that she "believed" Webb had interviewed the two candidates. Webb did not testify for the Employer, although the Union asserts he was present for the entire hearing.

[8]

There was no testimony concerning Crowley's or Lutz's authority to approve time off.

[\[9\]](#)

Although Beatty has not conducted a performance evaluation since assuming her current position, she described the procedure she followed in her previous position. There is no evidence to suggest the procedure has changed since then.

[\[10\]](#)

The manual has been in effect only since December 2005.

[\[11\]](#)

Ehly testified that Beatty has the authority to discipline employees who report to her, but he cited no instances when she has done so. Additionally, Ehly speculated that he would accept Beatty's recommendations regarding any discipline she deemed appropriate.

[\[12\]](#)

273 NLRB 1677, 1689 (1985).

[\[13\]](#)

175 NLRB 871 (1969).

[\[14\]](#)

532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[\[15\]](#)

308 NLRB 101, 102 (1992).

[\[16\]](#)

317 NLRB 1128 (1995).

[\[17\]](#)

216 NLRB 551 (1975).

[\[18\]](#)

304 NLRB 861, 864 (1991).

[\[19\]](#)

300 NLRB 1 (1990).

[\[20\]](#)

335 NLRB 777 (2001).

[\[21\]](#)

284 NLRB 887 (1987).

[\[22\]](#)

297 NLRB 390 (1989).

[\[23\]](#)

295 NLRB 390 (1989).

[\[24\]](#)

313 NLRB 835, 836 (1994).

[\[25\]](#)

328 NLRB 879 (1999).

[\[26\]](#)

335 NLRB No. 63, slip op. at 3 (2001).

[\[27\]](#)

Crowley testified that she occasionally strays from the formula in extraordinary circumstances, such as when a faculty member tells her a particular student is “the best poet I’ve ever seen apply to our program” and asks for the maximum scholarship possible. Crowley did not indicate how often such a situation might arise.

[\[28\]](#)

416 U.S. 267 (1974).

[\[29\]](#)

306 NLRB 871 (1992).

[\[30\]](#)

303 NLRB 696, 714 (1991).

[\[31\]](#)

444 U.S. 672, 682-683 (1980).

[\[32\]](#)

Supra.

[\[33\]](#)

Even if their ideas were adopted, they are insufficient to confer managerial status, as the proposals relate to *administrative* changes, not the kind of programmatic changes that reflect true managerial authority.

[\[34\]](#)

237 NLRB 205 (1978).

[\[35\]](#)

Although Crowley did not indicate how often this occurs, it is clear from the example she used that it is a rare occurrence.

[\[36\]](#)

115 NLRB 722, 724 (1956).

[\[37\]](#)

318 NLRB 1160 (1995).

[\[38\]](#)

156 NLRB 1236 (1966).

[\[39\]](#)

394 U.S. 759 (1969).

[\[40\]](#)

315 NLRB 359 (1994).